

No. 2923

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and H. J. PATTERSON, vs. EDWARD STROECKER, as trustee of the estate of H. J. Patterson, a bankrupt,	}	<i>Appellants,</i> <i>Appellee.</i>
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APPELLEE'S PETITION FOR A REHEARING.

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FILED
NOV 7 - 1917
F. D. MONCKTON,
Clerk.

Filed this.....day of November, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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MARIAM A. PATTERSON and
H. J. PATTERSON,
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VS.

EDWARD STROECKER, as trustee of
the estate of H. J. Patterson,
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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The appellee respectfully petitions the Court
for a rehearing of this cause for the following
reasons:

I.

APPELLEE HAS NOT HAD AN OPPORTUNITY TO PRESENT THIS APPEAL UPON THE GROUND THAT MRS. PATTERSON WAS EQUITABLE OWNER, AS NOW HELD BY THIS COURT. THE CASE WAS TRIED UPON THE SOLE THEORY THAT HER RIGHTS CAME FROM HER DEED, AND THE EVIDENCE THAT SHE ADVANCED THE ASSESSMENT WORK MONEY ON AGREEMENT WITH HER HUSBAND THAT SHE SHOULD OWN THE BARE LEGAL TITLE TO THE QUARTER INTEREST, WAS ONLY INTRODUCED TO SHOW THAT PATTERSON'S DEED TO HIS WIFE WAS NOT A FRAUD ON HIS CREDITORS, BECAUSE OF THEIR FORMER ORAL AGREEMENT AND THAT SHE ADVANCED THE ASSESSMENT WORK MONEY.

The opinion of this Court reversing the judgment given appellee is based upon the ground that Mrs. Patterson was the *equitable* owner of the quarter interest because she advanced the money to do the assessment work under agreement with her husband that when the legal title was conveyed by Wickersham Mrs. Patterson should own the bare legal title; and we submit that this conclusion is erroneous.

In the *present* opinion of the Court, referring to the *former* opinion, it is said "We said 'the burden was cast upon the defendants to show the good faith and honesty of *the conveyance* in question', and we remanded the case for a new trial. Now, upon the second trial the defendants have shown the good faith and honesty of the conveyance * * *". That was the only theory and purpose of the evidence that Patterson and his

wife agreed that if she would do and pay for the assessment work, she should own the *bare legal* title to the quarter interest; and having shown that, appellants contended both there and here that Patterson's *deed* to her gave her the right to his share of the royalties coming to Patterson and carried *his* leasehold interest with it.

Nowhere was it ever pretended that the *deed* by Patterson to Mrs. Patterson carried with it Patterson's lease with Wickersham; nor was it ever contended anywhere in the case, that Mrs. Patterson became or ever was the *equitable* owner of Patterson's lease with Wickersham or of any royalties coming to Patterson under that lease.

Appellee was *nonsuited* on the first trial, and that judgment was reversed. There was not sufficient evidence before the Court on the first trial to show that she was the equitable owner of the bare legal title to the quarter interest to overcome the inference of fraud in making the deed.

The appellant's claim on the retrial and in this Court on this appeal was under the *deed* from her husband, and the *evidence* of her oral agreement with Patterson to advance the assessment work money and he to convey her the *bare legal* title, which he did, was introduced to overthrow any inference of *fraud* in the deed by Patterson to her; and the case was not tried below nor presented here upon the *theory* that she was always the *equitable* owner and that Patterson merely held the bare legal title to the quarter interest for

her until he actually conveyed by the deed in controversy.

The complaint and her *answer* and the answer of Patterson on the first appeal, and the complaint and her *answer* and Patterson's answer on this appeal are *identically the same*; and each and all they assert, that *only the bare legal title* should and did pass by Wickersham's deed to Patterson and by Patterson's deed to his wife

Wickersham and Patterson agreed that by Wickersham's deed to Patterson the bare legal interest only in the one-quarter should pass to Patterson, and that Patterson could and would convey only the bare legal title; and all of the evidence shows that was the purpose and intention of Wickersham, of Patterson and of Mrs. Patterson, and effect of the deed by Patterson to his wife, and that no interest in or under the lease or lay or the royalties from working the same, should ever pass to or vest in Mrs. Patterson.

The documentary evidence and the testimony of the witnesses found in the record on the present appeal, also in the record on the former appeal, conclusively show:

First. That Wickersham conveyed to Patterson, by express understanding between them when the deed was delivered, that the "*bare legal title*" only, in the quarter interest, would pass and be conveyed by the deed to Patterson.

Mrs. Patterson's *answer*, paragraph "4" (Tr. fol. 15; Former Appeal, Tr. fols. 14-15) expressly alleges:

" * * * the said Wickersham did make such deed to said H. J. Patterson, and delivered the same to said Patterson on November 10, 1911, *but with the express understanding* had between said Wickersham and said Patterson, that the latter would convey *the bare legal title* to said quarter interest, *so received* by him, *to this defendant*" (Tr. fol. 15); *Patterson's Answer*, the same (Tr. fol. 21; Former Tr. fols. 20-21).

She admits, in her answer, that on the morning of November 27, 1911, "*the bare legal title*", was conveyed to Patterson and that the same evening Patterson conveyed *to her* "*the bare legal title*" to said quarter interest and that *prior* thereto, Patterson had lay or lease from Wickersham, and that Patterson *assigned* said lease to Hamilton (Tr. fols. 11-12; Former Tr. fols. 11-12).

The *lease* made by Wickersham would *expire* on October 12, 1915 (Tr. fols. 58), and the *assignment* made by Patterson to Hamilton was for the *same time* (Tr. fol. 72).

She expressly alleges, that Patterson received from Wickersham "*the bare legal title* to said quarter interest for the sole purpose of conveying same to her, and on November 27, 1911, he did execute a deed to her "*for the sole purpose* of transferring to her *the bare legal title* then standing in his name", and, that *she* "*then and there received*

the bare legal title to said interest” (Tr. fol. 12; Former Tr. fol. 11).

In all *her* testimony, she declares that Patterson agreed to

“give me the *quarter* interest” (Tr. fol. 150), “if I would do the work necessary to *acquire the quarter* interest” (Tr. fol. 150). “We thought *the quarter* interest would be cheap at that” (Tr. fol. 150). “I regarded myself as entitled to the deed to *the quarter* interest * * * because I had fulfilled by part of our contract to acquire *the quarter* interest” * * * “Judge Wickersham never objected to my being the owner of *the quarter* interest after he knew that the deed to *the quarter* interest had been made to me. * * * He never stated to me that Mr. Patterson was forbidden from conveying that *quarter* interest to me” (Tr. fol. 151). “I considered that I was the owner of the *quarter* interest” (Tr. fol. 153).

On *her* deposition and the second trial she testified:

“A. Harry had the lay and I owned the ground.

Q. Didn’t you, during the time I have mentioned, and prior to the 27th of November, 1911, continually, in talking with some of your friends, speak of that ground as the ground that Harry owned on Ester Creek?

A. No. I always said ‘we’, ‘our ground on Ester’.

Q. You didn’t speak of it as your ground?

A. Because *he had the lay and I had the interest*, so I said ‘we’” (Tr. fol. 155).

“Q. And that you consented to it.

A. Yes. I presume *I did say* when my deposition was taken at the time you referred to that *I did not have anything to do with the*

gold produced after the lease was assigned over to Mr. Hamilton and that my consent was not asked at the time of the assignment of the lay to him'' (Tr. fol. 157).

Nowhere in the whole record did she ever speak of anything being conveyed to her, except the *bare legal title* to this undivided *quarter* interest; and she knew that the *bare legal title* to the *quarter* interest and the *lease* or lay were absolutely *separate* rights, the *one* the bare legal title to the *quarter* interest, belonging to her, the *other* the *lease* or lay, although the *quarter* interest was subject to it from the date of the lease to the date of the expiration of the lease, yet, the lease or lay itself belonged to Patterson, her husband, and that she never had, never received, and never had any agreement to have or receive, and under the lease and agreement of Wickersham and Patterson, that *she* could not have or receive without the consent of Wickersham, any interest or right whatever in or to the lease or lay or the proceeds thereof. That is why she so testified, always, as to *her quarter* interest *in the claim*, and that *she*

“did *not* have anything to do *with the gold produced after the lease* was assigned over to Hamilton and that her consent was *not asked* at the time of the assignment of the lay to him” (Tr. fol. 155; Tr. fol. 157).

Patterson's testimony also deals only with the *quarter* interest—that Wickersham and he agreed on a *quarter* interest and a 75% lay, and he told his wife *she* could have the *quarter* interest, if she

would pay for sinking the hole to bedrock, as *he* would need all the money *he* had *to open up* the ground (Tr. fol. 94). *Patterson* declared: "*I considered a 75% lay on the ground very much more valuable than a quarter interest in the property. I was particularly concerned about the lease on the property*" (Tr. fol. 96). *Mrs. Patterson* corroborates this intention and purpose, of *Patterson* to get the lease or lay *for himself*, and of *Mrs. Patterson* to get the bare legal title to the *quarter* interest, which *quarter* interest at the *end* of the lease in October, 1915 (Tr. fol. 58), *she* would own in absolute right; and *she* declares:

"I came to pay for sinking those drill holes in this way: Mr. Patterson said he believed he would go to town and see if he could get a *half interest* in the Daly bench from Judge Wickersham *for sinking some holes or doing some assessment* work on the Daly bench; Judge Wickersham did *not consent to give him a half interest* but told him he *would* give a *quarter interest and a 75% lay*; then, as *he* had only a very little money himself and he wanted to use that for *mining* purposes, he told me that *if I* would pay for sinking the holes and do the work necessary *to acquire* the *quarter interest*, he would give me *the quarter interest*; so I consented" (Tr. fols. 149-150).

Confirming all this, and demonstrating the absolute separation of the lease or lay *and* the bare legal title to the *quarter interest*, is the *deed* by Wickersham to Patterson of the *quarter interest*, reciting:

"Said conveyance *is made in consideration* of the doing of the *assessment work* thereon by

the vendee in the year 1910, in compliance with the United States statute" (Tr. fol. 70).

Second. The very *terms* of the *lease* itself show *its separation* from the *bare* legal title of the quarter interest, while *subjecting* the quarter interest absolutely to the lease and the rights and liabilities of Patterson, the lessee thereunder, and the *ownership of the lease* in Patterson as absolutely *separated* from the bare legal title which was in Mrs. Patterson.

This lease or lay will be found in the transcript, pages 56 to 65; and, among other conditions, declares:

"The party of the first part (Wickersham) does hereby grant, devise and lease unto the said party of the second part (Patterson), the party of the second part does hereby accept the lease of *the whole* of the said premises together with all appurtenances and the right and privilege to prospect and mine the same and to extract therefrom all the gold and gold-bearing placers therein contained subject to the terms of this agreement:

"To have and to hold the same unto the said party of the second part from the date of this agreement until the 12th day of October, 1915, unless sooner determined or forfeited through the failure of the party of the second part to pay and deliver the rents and royalties agreed upon, or for other violation of the terms, covenants and conditions in this lease, or the agreement of even date herewith, against the said party of the second part reserved.

"*As part consideration* of this lease the party of the second part agrees that *his undivided*

one-fourth interest in said premises shall be covered and included in the terms of this lease and shall also at all times be subject to any debts, defaults or damages resulting from the working under this lease, or for violation thereof and the said Daly claim shall at all times be worked and considered as a whole between the parties hereto, and all subject to the terms of this lease and it is especially agreed that the party of the first part shall have a first lien upon the whole of the output of the whole of the Daly claim, including the undivided one-fourth interest of the party of the second part for the payment of the royalty reserved to the party of the first part and the performance of the terms of this lease" (Tr. fols. 57-58).

Wickersham had the legal right to make the lease to Patterson and convey the bare legal title to the quarter interest (which was *subjected* to the terms of the *lease*) *also* to Patterson; each *separate* estates, a leasehold and a fee subjected to the terms of the lease, and that is what Wickersham did. Patterson had the legal right to agree with his wife that if she did the assessment work *she* should own the quarter interest; each again *separate* estates, a leasehold estate *in Patterson*, and the fee in the quarter interest *in Mrs. Patterson*, and that is what Patterson and his wife agreed, and that is what Patterson conveyed to his wife, admitted and expressly alleged in the complaint and in the *separate* answers of *Mrs. Patterson* and *Patterson*; and that is what the testimony of *Mrs. Patterson* and *Patterson*, above quoted, demonstrates.

Mrs. Patterson owned the fee of the quarter interest, *subject* to the lease to Patterson. *Patterson* owned the lease; and *at the expiration* of the lease, *Mrs.* Patterson owned the *absolute* fee.

The opinion of this Court is not correct in stating that Patterson was *her agent*. Patterson was the *lessee* from Wickersham and *Mrs.* Patterson was the owner of the quarter interest, subjected to the lease of Wickersham to Patterson. *Mrs.* Patterson did not own and had no interest in this lease from Wickersham to Patterson, and it was expressly agreed between Wickersham and Patterson, and between *Mrs.* Patterson and her husband that *he* owned the lease, *she* owned the quarter interest subjected to his lease.

Patterson as owner of the lease had the absolute legal right to *sub-lease* to Hamilton with Wickersham's consent, which he did.

The *complaint* prayed the following relief:

1. That *Mrs.* Patterson had no interest in this gold dust, because it was royalty under Wickersham's lease to Patterson and Patterson's sub-lease to Hamilton.

2. That the *deed* from Patterson to his wife be declared fraudulent and that she reconvey the quarter interest (Tr. fols. 9-10).

The present judgment gives *Mrs.* Patterson her *quarter interest* which Patterson's *deed* conveyed to her; and gives the *royalty* under the sub-lease to Hamilton of the Wickersham lease to Patterson.

Mrs. Patterson never claimed to own the *leasehold* interest of Patterson under the lease to him by Wickersham; that lease was *his*, and his sub-lease of that lease to Hamilton *was his*; it never was, it never became, it was never agreed to be Mrs. Patterson's, and it was never assigned to her and did not pass to her by Patterson's *deed*.

The Court is in error in holding that Patterson was the trustee for his wife of the *leasehold* interest; he *was* trustee for his wife of the *bare legal title* subjected to his own leasehold. Patterson never gave a lease to Hamilton or received a lease from Wickersham of *the quarter* interest of Mrs. Patterson. Patterson *sublet his own lease* to Hamilton.

We respectfully submit, that this Court in its opinion has reversed appellee's judgment upon a *ground and theory different* from that upon which the case was tried *under the pleadings and the evidence*, and presented in this Court upon both the former and the present appeal.

And we respectfully ask that the Court give us an opportunity which we have not had, on a rehearing, of presenting this case on the ground and theory stated in the opinion of the Court.

II.

THE JUDGMENT HERE ONLY CONCERNS THE GOLD DUST, THE ROYALTY PAYABLE TO PATTERSON BY HAMILTON UNDER THE SUB-LEASE BY PATTERSON OF HIS LEASE WITH WICKERSHAM. MRS. PATTERSON NEVER CLAIMED TO OWN THE LEASEHOLD INTEREST WHICH WICKERSHAM GAVE TO PATTERSON UNDER HIS LEASE; PATTERSON NEVER AGREED TO CONVEY AND NEVER CONVEYED HIS LEASEHOLD INTEREST TO MRS. PATTERSON, AND SHE DOES NOT CLAIM THAT HE DID. THEREFORE, THERE CAN BE NO QUESTION BUT THAT THE FORMER DECISION IS THE LAW OF THE CASE.

There is no claim or pretense of claim anywhere or at any time in the lower Court or in this Court, that Patterson agreed that *Mrs.* Patterson should own *his lease* with Wickersham, if she would do the work and pay the assessment work money; and she claimed the royalty under the sub-lease to Hamilton because of and under Patterson's deed to her, which this Court clearly held on the former appeal the deed did not convey to her.

The leasehold interest of Patterson under *his* lease with Wickersham always was his own. He never agreed and *Mrs.* Patterson never asserted that Patterson agreed that *she* should own *his* lease with Wickersham. And of course, if Patterson owned the Wickersham lease, as he admittedly did, he owned also the *sub-lease* he made to Hamilton of the Wickersham lease.

Mrs. Patterson owned the quarter interest in the mine, but *subjected* to the lease of Patterson with Wickersham; and Patterson himself owned

the lease he made with Wickersham, and the sub-lease of that lease which he made with Hamilton, and the royalties therefrom.

The Wickersham lease to Patterson and his sub-lease thereof to Hamilton are absolutely *separate* from the bare legal title to the quarter interest which Patterson agreed he would give her if she did the assessment work and which he subsequently deeded to her.

Wickersham made a *lease* to Patterson which subjected the *whole claim* to its terms.

Wickersham also, after making the lease, made a separate *deed* to Patterson for a quarter interest in the claim.

The *answer* of Mariam A. Patterson (Tr. fol. 15), expressly declares

“that after Wickersham returned to Fairbanks, said H. J. Patterson requested him to make a deed conveying said *quarter interest* to this defendant (Mariam) upon the ground that *she* had performed the conditions of said *contract*, but the said Wickersham *preferred to*, and did, make such deed to the said H. J. Patterson, without the knowledge or consent of this defendant, and *delivered* the same to said H. J. Patterson on or about the 10th day of November, 1911, *but with the express understanding* had between the said Wickersham and the said H. J. Patterson at the time of such delivery, *that the latter would convey the bare legal title to said quarter interest* so received by him *to this defendant*” (Tr. fol. 15).

The answer of Patterson is the same (Tr. fols. 20-23).

H. J. Patterson, her husband, testified:

“I asked Wickersham for a half interest *and* a lay on the claim; he refused, but offered me a quarter interest *and* a 75% lay on the whole claim; we agreed to *that* proposition. * * * I told Mrs. Patterson * * * that if she wanted to pay for sinking the drill hole to bedrock, that *she* could have *the quarter interest*; if we struck pay *I* would *need all* the money *I* had to *open up* the ground, and she was willing to take the chance” (Tr. fols. 94-95).

Mariam A. Patterson testified:

“Judge Wickersham did not consent to give him a *half* interest, but told him he would give him a *quarter* interest *and* a 75% *lay*; then as he had only a very little money himself and he wanted to use that for working purposes, for mining purposes, he told me that if I would pay for sinking the holes, do the work necessary to acquire *the quarter* interest, that he would give me *the quarter* interest; so I consented. * * * We thought *the quarter* interest, if there was anything in it at all, would be cheap at that. * * * After he got to town *he phoned me* that the judge *wasn't* willing to *make the deed* in my name. * * * I regarded myself as entitled to have the deed to *the quarter* interest * * * in paying for the work necessary to acquire *the quarter* interest” (Tr. fols. 149-151).

“I presume I did say when my deposition was taken * * * that *I did not* have anything to do with *the gold produced after the lease was assigned* over to Mr. Hamilton and

that *my consent* was not asked at the time of the assignment of *the lay* to him” (Tr. fol. 157).

“I *permitted* my husband to *sign* his name to instruments in evidence here *in* which it is stated that *he is the owner* of the property” (Tr. fol. 161).

Patterson continues his testimony:

“I did nothing under *the lease* part of the agreement, with the result that Wickersham forfeited the lease. I then secured a *new lease*, but had to consent to a great many things before I got it. *I considered a 75% lay* on the ground very much *more valuable than a quarter interest* in the property; *I* was particularly *concerned* about the *lease* on the property. * * * Wickersham told me, ‘You have forfeited your *lease*, but I will give *you* the *quarter interest* any time, but if you get the *new lease* you will *have to undertake* certain obligations; those obligations are set forth in the *lease* of October 12, 1911, and the *agreement* (Tr. fols. 56-69) made at the time (Tr. fols. 96).

“I asked him to make the *deed* to Mrs. Patterson, because, as I told him, she had paid for sinking the drill holes. He *didn’t* do that and stated as his reason, ‘I don’t want to mix things up. *I want to do* business with *you*. I will give *you the deed* (Tr. fol. 69) and you can make *the deed* to whoever you like’. * * * I transferred or assigned the *lease* (Tr. fols. 71-73) to Henry C. Hamilton” (Tr. fols. 97-98).

“On the 27th day of November, 1911, I executed a *conveyance of this quarter interest* to my wife” (Tr. fol. 100).

“There was *no assignment of this lease or my interest* in this lease, to Mrs. Patterson. No, there has *never been any assignment* in any other way of any interest in this lease to Mrs. Patterson” (Tr. fol. 126).

We respectfully ask the Court to grant us a rehearing of this cause, especially do we ask the opportunity to be reheard by the Court because the *opinion* and decision of the Court have passed upon a ground and theory of the case different from that taken upon the trial, and different from that upon which the case was presented to this Court in the written briefs.

Dated, San Francisco,
November 7, 1917.

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H. E. PRATT,
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Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehear-

ing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

CHARLES J. HEGGERTY,
*Of Counsel for Appellee
and Petitioner. JB.*